No. 15,376

United States Court of Appeals

For the Ninth Circuit

JAY W. SELBY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTION.

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division (7-8).*

The District Court made no findings of fact or conclusions of law. No opinion of the Court was rendered. The Court merely found the Appellant guilty as charged in the indictment (80). Title 18, Section 3231, United States Code, confers jurisdiction in the District Court over the prosecution of this case. The indictment charged an offense against the laws of the United States (3). This Court has jurisdiction of this

*Refer to pages in printed Transcript of Record.

appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The Notice of Appeal was filed within the time and in the manner required by law (8).

STATEMENT OF CASE.

The indictment charged the Appellant with a violation of Section 12(a), Universal Military Training and Service Act, 50 U. S. C. App. 462 (a). It was alleged that after registration and classification Defendant was required to report for induction and "did on the 1st day of November, 1955, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and to be inducted into the Armed Forces of the United States as provided in the said act and the rules and regulations made pursuant thereto (3-4). The Appellant was arraigned. He pleaded "not guilty." Trial by jury was waived and he consented to trial by the Court (6). The case was called for trial on August 27, 1956. Evidence was received (12), and the cause taken under submission. A Motion for Judgment of Acquittal was made at the close of the evidence (26). There appears to be no ruling on the Motion in the record, however, the Defendant was found guilty (80). The Court sentenced the Appellant to two years in a Federal Penitentiary (7-8). Judgment and commitment were entered in the Court below, in accordance therewith. Notice of Appeal was duly and timely served (8).

Application was made for bail in the Trial Court pending appeal (84), which was granted. The Transcript of the Record, including statement of Points Relied On, has been filed (9-88).

SPECIFICATIONS OF ERROR.

The Trial Court erred in:

(1) Rendering a judgment against defendant and in failing to acquit him;

(2) Failing to find that the Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment;

(3) Failing to find that the denial of the conscientious objector status by the local board and the board of appeal and the recommendation by the hearing officer of the Department of Justice and board of appeal were without basis in fact, arbitrary, capricious and contrary to law;

(4) Failing to find the report of the hearing officer relied upon by the Department of Justice and the board of appeal is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and advises the appeal board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector.

QUESTIONS PRESENTED AND HOW RAISED.

The undisputed evidence showed appellant possessed conscientious objections to participation in both combatant and noncombatant military service. His objections are based upon his sincere belief in the Supreme Being. His obligations to the Supreme Being are superior to those owed to the government and are above those flowing from any human relations. His beliefs are not the results of political, philosophical, or sociological views but they are based solidly on the Word of God.

The local board classified Selby I-A. There was a Department of Justice hearing, following the completion of the investigation by the FBI, and the hearing officer made a recommendation to the Department of Justice on Selby's conscientious objector claim. The Assistant Attorney General made a final recommendation to the appeal board. The appeal board denied the conscientious objector status based upon the recommendation of the Department of Justice.

In the motion for judgment of acquittal appellant complained that the denial of the conscientious objector status by the appeal board was without basis in fact, arbitrary, capricious and contrary to law.

The question presented here, therefore, is whether such denial of the claim for classification as a conscientious objector was arbitrary, capricious and without basis in fact.

STATUTES INVOLVED.

Section 6(j) of the act (50 U. S. C. App. §456(j), 62 Stat. 609) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such persons shall be notified of the time and

place of such hearing. The Department of Justice shall after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of concientious objections."

FACTS.

Upon the commencement of the trial and by stipulation of the parties, a certified photostatic copy of the Selective Service File was offered in evidence as Plaintiff's "Exhibit I." The file contains a number of pages, each of which contains written numerals either with a circle around the number or a line underneath the number. Since a proper presentation of the facts requires reference to some of the pages in the Selective Service File, all references hereafter

shall refer to this file and the page number either circled or underlined in parenthesis.

Appellant registered, at the time, and in the manner required by law, with local board No. 66, Monterey County. (Page 1, circled.) He filed his classification questionnaire on April 17, 1951. (Page 4, circled). As indicated in the classification questionnaire, at the time of the filing of said questionnaire, Appellant was a seaman recruit in the Naval Reserve, having entered into such component on April 3, 1951. (Page 5, circled.) On March 6, 1952, registrant was discharged from the Naval Reserve for the reason he was found to be a conscientious objector. (Page 16, circled.) The file then contains two affidavits attesting to the fact that the Defendant was associated with Jehovah's Witnesses in Watsonville, California, from some time in June, 1951. (Page 22, circled and page 23, circled.) The file then indicates that the Defendant was ordained as a minister of Jehovah's Witnesses on September 1, 1951, at Santa Cruz, California. (Page 24, circled.) On July 1, 1952, the Defendant filed a special form for conscientious objectors in which he stated that his belief in a Supreme Being involved duties which, to him, were superior to those arising from any human relation. He further states that he was baptized and made his covenant with God on September 1st, 1951, at Santa Cruz; that he had given many public expressions of his beliefs, and he states that by reason of religious training and belief, he is conscientiously opposed to any participation in war in any form and

is conscientiously opposed to participation in noncombatant training or service in the Armed Forces. (Pages 29 through 32, circled.)

His file then contains a number of further affidavits attesting to the fact that the Defendant was conscientious in his religious activities and beliefs. (Pages 37, 38, 39, 40, 41, 42, 43, 44 and 45, circled.)

On August 11, 1952, the Defendant appeared before the local board for a personal hearing and a purported written transcript of the hearing is set forth in which numerous questions and answers appear. (Pages 46 to and including 49, circled.)

On page 48 a statement is made by one of the members of the local board as follows:

> "You realize, do you not, that Jehovah's Witness is not recognized as a minister?" (Page 48, circled.)

After a request, therefore, on November 3, 1952, the Defendant appeared for a personal appearance again before the local board. A short resume of the hearing is contained in the file and it appears that the Defendant stated that whereas when he appeared before he wished a minister's classification, he now would like a conscientious objector's classification, being classification I-O. (Page 63, circled.) The file then contains an affidavit, filed on behalf of the Defendant, in which it is set forth that the Defendant has six sisters and five brothers now living; that his entire family, with the exception of one sister and one brother, belong to the Jehovah's Witnesses. The

Defendant was graduated from Watsonville Union High School in June of 1950; that prior to his graduation he was employed on a part-time basis by the Pringle Tractor Company, and became a full time employee after his graduation. That during the summer of 1950, he was sent by Pringle to King City, California, to work in its agency there; that he returned each weekend to Watsonville to visit with his parents; that up until this time, his movements were those of most normal boys; that he had fun, worked, was good to his family, and enjoyed the company of his male companions and when his friends joined the Naval Reserve in Santa Cruz, California, on April 3, 1951, he, too, joined that Reserve; that while participating in the Reserve activities and working at the Pringle Tractor Company in King City he continued to return to his home in Watsonville on weekends; that as was their custom, his parents held nightly meetings in their home, devoted to prayer and to the teachings of their faith, known as Jehovah's Witnesses; that he was subjected to their teachings, and that he became deeply influenced by them; that, as a result of this indoctrination, he became a member of that faith in June of 1951; that he informed the officers of the Naval Reserve that he could not longer report for training because of his religious views and in July of 1951, the Naval Reserve transferred Selby to inactive duty. The Defendant's interest in the work of Jehovah's Witnesses grew and he continued to study the Bible and the works of his faith; that he became an ordained minister of the

faith on September 1, 1951, by the regular procedure of the faith, namely, that of baptism by immersion in water and the subsequent consecration of his life to the teachings of the word of God. That after a hearing by the Naval Board, including the questioning by the Chaplain and other Clergy, on his religious views, he did, on March 6, 1952, receive an Honorable Discharge, having been found to be a conscientious objector. (Pages 68 to 74, circled.) There then appears in the file, a summary of a statement taken unsolicited from a Mr. and Mrs. E. Knauss, of Santa Cruz, in which they claim they were much incensed over the fact that the Defendant is not in the service; that all the boys who were in the same school class together with the Defendant were now in the Service except the Defendant; that the neighbors are getting more incensed by the day as their children are having to go and the Defendant does not; they admit that the Defendant goes to Church but that he "could be a Chaplain in the service if he won't fight, but that he should be in the service, and that he and his neighbors are good and sore 'about it.'" (Page 85, circled.)

On May 13, 1953, the Department of Justice issued a finding, pursuant to a hearing, that the Registrant was not entitled to a conscientious objector classification. This Finding was, apparently, as indicated by the report, predicated upon the proposition that the Defendant had made the statement that he was not a "pacifist" and since pacifism is opposition to war, or to the use of military force for any person,

it was clear that the Defendant is not opposed to war in any form and he is, therefore, not entitled to exemption as a conscientious objector, within the meaning of the act. (Pages 87 and 88, circled.)

As a result, the Defendant was retained in classification I-A, and was ordered for induction but refused to be inducted. (Page 115, underlined; page also marked 180.) By reason of such refusal, the Defendant was indicted on October 21, 1953 for refusal to submit to induction. He pleaded "not guilty" and his trial was set for December 2, 1953. (Page 104, underlined; also numbered 191.) District Judge O. D. Hamlin found the Defendant "not guilty" on January 13, 1954, and the Defendant was acquitted. (Page 102, underlined; also numbered 193.)

A second Conscientious Objector Form was prepared by Defendant and filed on September 28, 1954, in which the Defendant reiterated his objection to both combatant and non-combatant military training and service. (Page 90, underlined; also numbered 201.) The file contains a photostatic copy of the Honorable Discharge of the Defendant as a Seaman Recruit from the United States Navy on the 6th day of March, 1952. (Page 83, underlined; also numbered 211.)

On October 11, 1954, a certified copy of the Finding of the Bureau of Naval Personnel was filed. This Finding disclosed that the Defendant enlisted in the Naval Reserve on April 3, 1951, to serve for a period of four years. There existed no obligation on the part of the Navy Department to discharge

the Defendant prior to the expiration of his contractual enlistment; however, the facts and circumstances of the Defendant's case had been considered by a Board of Officers appointed for that purpose. The information submitted indicated that Selby is sincere in his religious convictions, objecting to combatant as well as non-combatant duty and the Board recommends that the Defendant be discharged by reason of convenience of the Government and not recommended for reenlistment. It was further requested in the Finding that the Director of Selective Service of the State in which the Defendant resided upon discharge be notified of his discharge from the U. S. Naval Reserve and the reasons therefor; it was further directed that a copy of the Finding be sent to the National Selective Service Headquarters in Washington, D. C. (Page 82, underlined; also page 214.)

On October 11, 1954, the Defendant received a personal appearance before the Local Board. Defendant stated that he was claiming Ministerial and Conscientious Objector Classification. Defendant further stated that he had become a full time Minister on September 1, 1954; that he had not had any secular employment since that date, but that he was, at that date (October 11, 1954, the date of the hearing), looking for a job; that he spent between June 1, 1954 and September 1, 1954, preparing for his appointment as a Pioneer Minister, doing no secular work whatsoever. (Page 78, underlined; also page 218.)

Defendant was retained in Class I-A, and duly appealed therefrom.

On June 7, 1955, the Special Assistant to the Attorney General made a report to the Chairman of the Appeal Board containing a recommendation that the claim of the Defendant to a Conscientious Objector Classification be denied. In this recommendation, a review is made of the hearing and of the resumé of the F.B.I. report. It is recited that the Defendant called the attention of the Hearing Officer to the fact that he had previously purchased a part-ownership in a service station but that his partners in the service station objected to him devoting too much time to his religious activities in Jehovah's Witnesses, and therefore required him to sell out his partnership interest. He testified that during 1954, he "pioneered" in Jehovah's Witnesses' ministry for about two months, but he was unable to serve a longer period of time, as a pioneer because it was necessary for him to make a secular living. He stated that his ambition in life is to become a pioneer minister and earn a livelihood by part-time work. He stated that because of his religious training and belief he could not engage in non-combatant military service and he stated that he has dedicated his life to Jehovah's Witnesses. The Hearing Officer noted that the attitude of certain former employees was that the registrant was insincere in his claim as a Conscientious Objector, and he therefore concluded that the registrant had failed to sustain his claim as a *genuine* Conscientious Objector by offering convincing proof as to his sincerity, and, accordingly, recommended that the claim of the registrant, based upon grounds of conscientious objection, be not sustained.

The Department of Justice adopted the recommendation of the hearing officer and recommended to the appeal board that the registrant's claim be not sustained. (Page 69, underlined; also page 227.)

The resumé of the investigative report made by the F. B. I. is contained in the file, and dated June 13, 1955. The resumé indicated that the Defendant graduated from Watsonville Union High School in 1950; former instructors had no knowledge of the registrant's religious beliefs, or his conscientious objector claim but advised that the registrant was a person of good character and they believed he would be sincere in his statements. The Defendant was employed by the Pringle Tractor Company at Watsonville from April 19, 1950 to April 15, 1952. Several persons, who were associated with the Defendant advised that they "doubt" the sincerity of the registrant's claims as a Conscientious Objector. One fellow employee stated that when he learned that the registrant was claiming to be a conscientious objector, he was very much surprised. He stated that the registrant had never indicated his objections and was a member of the Naval Reserve. This informant noted that the registrant joined the *Jehovah's Witnesses* some time after he had joined the Reserve and prior to the time he was due to be drafted. He stated he did not feel the registrant was sincere in his objections as they seemed to be too new and preceded too closely his imminent induction into the Armed Forces. An informant of the Farmer's Cooperative stated he did not feel that the registrant was sincere because he

appeared to have acquired his objections shortly before he was to be drafted. Another fellow employee stated that he heard the Registrant say, "I'm not worried about the draft, because I am a Conscientious Objector." The interviewee stated that this remark sounded to him like the registrant was using this status as an "out" to escape the draft and he did not feel that the registrant was conscientiously opposed to military service.

Another informant connected with the Townsend Electric Company stated that the defendant was discharged because it was learned that he had bought an interest in a gas station and was leaving his work at the Townsend Electric Company to work at the gas station. He further stated that he did not believe the registrant was sincere in his objections to military service inasmuch as it appeared to him that the registrant was an individual very much concerned with making money. The Defendant became a part owner of the Selby Service Station in June 1954, but ceased being a part owner in or about August 1954. The two partners of the business asked the Defendant to sell his interest to him, as it was their belief that the registrant was not doing his share of the work. The registrant was not able to devote enough time to the service station to satisfy his partners because he was devoting considerable time to the work of Jehovah's Witnesses. According to an interviewee, it was found that the Defendant's family enjoyed an excellent reputation in the vicinity where they lived. The Defendant was considered a fine, upstanding boy.

It was felt that if the Defendant had registered objection to Military Service, that he would be sincere and that his objections would be based upon religious teachings. Another neighbor advised that the Defendant's parents are Jehovah's Witnesses, as are the Defendant and his younger brother. It was the neighbor's opinion that the registrant's mother is very much the dominating member of the family where religion is concerned and that she is counselling the boys. The neighbor stated that it was difficult for him to understand how the registrant can spend as much time as he does making money so that he can obtain material things when it is his claim that he is opposed to military training and service because of his religious convictions. The records of the Watch Tower Bible and Tract Society indicated that the Defendant was ordained into Jehovah's Witnesses as a minister on September 2, 1951, and became a Pioneer on September 1, 1954. However, upon the registrant's request, his Pioneer appointment was terminated on November 1, 1954. Since November 27, 1953, the Defendant has been serving as a stock servant with the Jehovah's Witnesses congregation at Watsonville. References generally advise that the Defendant has been reared in the faith of Jehovah's Witnesses and they believe he is sincere in his religious beliefs and in his opposition to military service. (Page 64, to and including 68; also called page 230, to and including 234.)

On July 10, 1952, the 12th Naval District was asked for verification of prior service of the Defendant and

sent the information to the Local Board that the Defendant was Honorably Discharged as a Conscientious Objector from the Service. (Page 105, circled; also 44, underlined; also 73.) The Defendant was again refused a Conscientious Objector Classification and placed in Classification I-A. Thereafter, he refused to be inducted. (Page 242; also page 24, underlined.)

SUMMARY OF ARGUMENT.

THE APPEAL BOARD HAD NO BASIS IN FACT FOR THE DENIAL OF THE CLAIM MADE BY APPELLANT FOR CLASSIFICATION AS A CONSCIENTIOUS OBJECTOR AND IT ARBITRARILY AND CAPRICIOUSLY CLASSIFIED HIM IN CLASS I-A.

Section 6(j) of the act (50 U.S.C. App. §456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war, both combatant and noncombatant. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God higher than those to the

state. The evidence showed that his beliefs were not the result of political, sociological or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses.

The local board accepted Appellant's testimony. It is undisputed. Notwithstanding the undisputed evidence in his file, the local board and the district appeal board classified Appellant I-A and held that he was not entitled to the conscientious objector status.

The Supreme Court of the United States in *Dickinson v. United States* held that the "dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

Dickinson v. United States, 346 U.S. 389, 74 S. Ct. 152 (Nov. 30, 1953).

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.

Jewell v. United States, 208 F. 2d 770 (6th Cir. Dec. 22, 1953);

Taffs v. United States, 208 F. 2d 329 (8th Cir. Dec. 7, 1953);

Schuman v. United States, 208 F. 2d 801 (9th Cir. Dec. 21, 1953);

United States v. Pekarski, 207 F. 2d 930 (2d Cir. Oct. 23, 1953);

United States v. Alvies, 112 F. Supp. 618 (N. D. Cal. S. D. 1953);

United States v. Graham, 109 F. Supp. 377, 378 (W. D. Ky. 1952);

Annett v. United States, 205 F. 2d 689 (10th Cir. 1953);

United States v. Hartman, 209 F. 2d 366 (2d Cir. Jan. 8, 1954).

ARGUMENT.

THERE WAS NO BASIS IN FACT FOR THE DENIAL OF THE CONSCIENTIOUS OBJECTOR STATUS BY THE APPEAL BOARD TO PETITIONER; CONSEQUENTLY, THE FINAL I-A CLASSIFICATION IS ARBITRARY AND CAPRICIOUS.

(a) Legislative History.

Section 6(j) of the Universal Military Training and Service Act, *supra* (62 Stat. 604, 612, 65 Stat. 75, 86, 50 U.S.C. App. §456(j)) is altogether different from the Selective Service Act of 1917 (40 Stat. 76, 78, 50 U.S.C. App. §201). Section 4 of that act limited the conscientious objector status to members ". . . of any well recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations. . . ." This provision above quoted was similar to that appearing in Section 17 of the Act of February 24, 1864 (13 Stat. 6, 9).

Section 5(g) of the Selective Training and Service Act of 1940 omitted completely the requirement of

pacifism or membership in a "peace church." The 1940 act provided that a conscientious objector, "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," was exempt from participation in combatant training and service.

Pub. L. No. 783, 76th Cong., 2d Sess., 54 Stat. 887, 50 U.S.C. App. §305(g).

For a detailed statement of the legislative hearings and the history of the development of the 1940 law relating to conscientious objection, see Sibley and Jacob, *Conscription of Conscience,* Cornell University Press, Ithaca, New York, 1952, pp. 45-52. There is an interesting discussion of the 1917 and the 1940 conscientious objector provisions appearing in an article written by Marcus entitled "Some Aspects of Military Service," 30 Mich. L. Rev. (1941) 913, 943-946.

The present law is different from the 1917 act, which limited the protection to the pacifist religions. Both the discussions in Congress and the reports on the 1940 act show that Congress changed the law for conscientious objectors. It let the exemption stand on an individual basis, so long as the person based his objections on belief in the Supreme Being.

Under this present law the objections need not be pacifistic. They are sufficient when based on the Bible. Neither the 1948 act nor the 1951 act made reference to pacifism. Neither act fixed the religious standard of any certain religion as the yardstick. The conscientious objection provision extends even to

members of churches whose principles do not oppose war. It is an individual objection.

United States v. Everngam, D.W. Va., 1951, 102 F. Supp. 128, 130-131.

The only change that the 1948 act made was to prevent the nonreligious political, philosophical and sociological objectors from claiming the exemption.

Senate Report 1268, 80th Cong., 2d Sess., May 12, 1948, accompanying Senate Bill 2655, provided as follows:

> "(j) *Conscientious objectors.*—This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act. Exemption extends to anyone who, because of religious training and belief in his relationship to a Supreme Being, is conscientiously opposed to combatant military service or to both combatant and noncombatant military service. (See *United States v. Berman,* 156 F. (2d) 377, certiorari denied, 329 U.S. 795.) Elaborate provision is made for determining claims to exemption on this ground and provision is made for the assignment of persons who object to both combatant and noncombatant military service to work of national importance under the immediate direction of a civilian. The exemption is viewed as a privilege."

Under the law, whether the path of the objector is through the Bible or through the writings of the Shintoists, Moslems or Buddhists, he is entitled to his exemption. The 1948 and 1951 acts protect him. The law does not prescribe any fixed religious path through any of the writings. It did not to avoid

invading religious freedom in violation of the First Amendment. To do so would make the draft boards and the courts a religious hierarchy to determine what is orthodox in conscientious objection. That Congress did not intend.

All the Court can inquire about is confined to what the act says. The act says that one is a conscientious objector entitled to the benefits of the law if he shows that (1) he believes in the Supreme Being, (2) his belief imposes obligations higher than those owed to the state, (3) he opposes both combatant and noncombatant military service, and (4) his beliefs are not political, sociological or philosophical but are based on belief in God.

A strict construction of the act was not intended by Congress. It had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. Congress knew that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his secretary of war thought that conscien-

tious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.' "

As it appears above, the Selective Service System, in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.*, pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolutionary War to the Civil War provision for exemption of conscientious objectors appears in the state constitutions.

The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard v. United States,* 328 U.S. 61, 68-69. In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in view. It intended to preserve the freedom of religion and conscience in regard to conscientious objection and it provided a law whereby such freedom could be preserved.

(b) Review of Evidence.

The documentary evidence submitted by the Appellant establishes that he had a sincere and deep-seated conscientious objection against combatant and

non-combatant military service, which was based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on political, sociological, or philosophical views or a mere personal code, but that it was based on his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to that religion.*

There is not one iota of documentary evidence that in any way disputes the Appellant's proof submitted showing that he is a conscientious objector. The statements of fact made by the Hearing Officer of the Department of Justice and the summary of the F. B. I. investigative report do not contradict, but altogether corroborate the statements made by the Appellant in his conscientious objector form.

The Department of Justice makes an extensive ex parte investigation of the claims for classification as a conscientious objector, when first denied by the Appeal Board pursuant to 50 U.S.C. Appendix, Section 456(j). If there was any adverse evidence, certainly the agents of the F. B. I., in their deep and scrutinous investigation would have turned it up and produced it to the Hearing Officer to be used against the Appellant. There was absolutely no evidence in the draft file that Appellant was willing to do Mili-

*He was raised in a home where his mother, father and nine of his eleven brothers and sisters were members of Jehovah's Witnesses.

tary Service. All of his papers, and every document supplied by him, staunchly presented the contention that he was conscientiously opposed to participation in both combatant and non-combatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the Appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended he was unwilling to go into the Armed Forces and do anything as part of a military machine and that his objection was by reason of his religious training and belief.

The only conclusion that Appellant can reach as to why the Appeal Board denied the conscientious objector status is that it adopted the recommendation of the hearing officer appointed by the Department of Justice which said officer made an erroneous interpretation of the law and which error was continued by the appeal board.

It is well known to the Congress, the Nation, the Government and the Courts of the United States that Jehovah's Witnesses are conscientiously opposed to both combatant and non-combatant military service. They were not unaware that these objections of the Jehovah's Witnesses are based on a belief in the Supremacy of God's Law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subverts the intent of Congress not to discriminate.

In this case, two hearings were had before a Hearing Officer appointed by the Department of Justice. In the first, on May 13, 1953, the Hearing Officer found as to Appellant and as a fact as follows: "He is a member of the Jehovah's Witnesses Sect and claims exemption from both combatant and noncombatant military service." (Plaintiff's Exhibit I, page 161; also 87, circled; also 138, underlined.) As a basis for denial of the conscientious objector classification, the Department of Justice in the first hearing found as follows: "The registrant states that he is not a Pacifist. The Sect has defined Pacifism as 'opposition to war or the use of military force for any purpose.' It is clear that the registrant is not opposed to war in any form and he is therefore not entitled to exemption as a conscientious objector within the meaning of the act." That such a conclusion would not support a basis in fact for a denial of a claim as a conscientious objector has been held by this Court in the recent case of *Affeldt Jr., v. United States of America,* decided December 14, 1954, 218 Federal (2d) 112 (9 Cir.), in which the Court held as follows:

> "The question then arises whether his classification in Class I-A by the Appeal Board was without basis in fact? We are of the opinion that the record here presents the same situation which we have previously dealt with in Hinkle v. United States of America, 216 Fed. (2d) 8 (9 Cir.) and Goetz v. United States of America, 216 Fed. (2d) 270 (9th Cir.), decided October 14, 1954. The above advice and recommendation by

the Department of Justice was in error for the reasons stated in those cases. Since the record wholly fails to disclose any other reason for the Appeal Board's action, in changing its original classification of I-O to the final classification of I-A, we must infer here, as we did in the Hinkle case that the Appeal Board, in substance, adopted the recommendation of the Department of Justice heretofore referred to. That Department indicated there was no reason to doubt the sincerity of Affeldt, in the beliefs which he expressed. Its recommendation was based upon its erroneous advice that since Affeldt would use force in self-defense, and defense of near relatives and brethren, *and because he had stated that he was not a Pacifist, he could not claim to be a conscientious objector within the meaning of the act.* The Appeal Board's obvious adoption of this view resulted in a classification which was without basis in fact, and, accordingly, Affeldt's conviction cannot be sustained. The Judgment is reversed." (Italics ours.)

On June 7, 1955, a second hearing was had before a Hearing Officer appointed by the Department of Justice. (Plaintiff's Exhibit I, page 69, underlined; also page 227.) Here again, the Hearing Officer found as a fact the following: "He is a member of Jehovah's Witnesses and claims exemption from both combatant and non-combatant military service by reason of his religious training and belief. As can be seen, this last report, which is ostensibly that of the Hearing Officer, is only a review of the report made by P. Oscar Smith, Special Assistant to the Attor-

ney General and is not the original report made by the Hearing Officer. (Plaintiff's Exhibit I, page 70, underlined; also page 229.) At the trial of the instant case, however, the trial court made an order directing the United States Attorney to produce the original report made by the Hearing Officer (Reporter's Transcript, page 72), and a copy of this original report was introduced into evidence as Government's Exhibit 2.

A comparison of the report contained in the draft file by the Justice Department and the original report made by the Hearing Officer (Plaintiff's Exhibit II), will indicate that the Justice Department incorporated substantially everything contained in the Hearing Officer's Report *with one glaring exception.* In the conclusion of the original report of the Hearing Officer (Plaintiff's Exhibit II), there is contained a statement as follows: *"It is true that the Registrant has lived a clean and moral life."* This statement is entirely omitted in the resumé made by the Department of Justice recommending against the conscientious objector classification. A finding by the Hearing Officer that the Appellant has lived a clean and moral life is tantamount to a finding that the Appellant is a truthful person. The conclusion of the Hearing Officer was not predicated upon any dispute in the evidence or any finding of untruthfulness or conflict in the evidence. The Hearing Officer merely states as follows: "It is however the opinion of the Hearing Officer that he has failed to sustain his claim as a genuine conscientious objector by offering con-

vincing proof as to his sincerity. In light of the fact that it is felt there is an absence of sincerity to his claim, it is recommended that his claim be not sustained and that he be classified I-A." (Pl. Exh. 2.) These statements are preceded in the conclusion by the following: "Attention is invited to the attitude of certain former employees who expressed the opinion that the Registrant was insincere in his claim as a conscientious objector. It must therefore be concluded that the Hearing Officer denied the I-O classification of the Appellant on two grounds: (1) that the Appellant failed to offer convincing proof as to his sincerity, (2) that certain former employees had expressed opinions that the Registrant was insincere in his claim.

What possible more convincing proof could the Appellant have given than is contained in the file and reviewed in the facts, which show conclusively and without contradiction that the Appellant was baptised a Jehovah's Witness on September 1, 1951, and has ever since that date been actively dedicated to the tenets of his religion as a Jehovah Witness. (Government Exhibit I, page 24, circled; pages 29 through 32, circled.) Thereafter, on March 6, 1952, Appellant was discharged from the Naval Reserve after a full hearing for the reason that he was found to be a conscientious objector. (Government Exhibit I, page 16, circled; page 82, underlined; also page 214.) A larger number of affidavits appear in the file, indicating that the Appellant was a member of the Jehovah's Witnesses and sincere and conscientious

in his beliefs. (Government Exhibit I, page 24, circled; page 22 and page 23, circled; pages 37, 38, 39, 40, 41, 42, 43, 44 and 45, circled). A lengthy affidavit is contained in the file which clearly shows how the Appellant was subjected to the teachings of Jehovah's Witnesses in his own home, where nightly meetings devoted to prayer and to the teachings of the Faith of Jehovah's Witnesses were held by his parents; that he was subjected to these teachings and that he became deeply influenced by them; that as a result of this indoctrination, he became a member of that faith and that thereafter his interest in this work grew and he continued to study and became ordained a minister of the Faith on September 1, 1951. (Plaintiff's Exhibit I, pages 68 to 74, circled.) Even the hysterical statements made by persons who admitted they were incensed over the fact that the Appellant was not in the service, admitted that the Appellant does attend his Church regularly but suggested that he could be a Chaplain in the service if he wouldn't fight. (Government's Exhibit I, page 85.) The F. B. I. report indicates that the records of the Jehovah's Witnesses were checked and were found to indicate that the Appellant was an active member of the religious organization from September 1951, and became a full time pioneer minister on September 1, 1954. However the full time ministerial status was terminated on November 1, 1954, for the reason that it was necessary for him to earn a livelihood, but that since November 27, 1953, to the time of the report the Appellant served as a stock servant in the Jehovah's Witnesses' Congregation at Watsonville.

References generally advise that the Defendant has been reared in the faith of Jehovah's Witnesses and that they believe he is sincere in his religious beliefs, and in his opposition to military service. (Plaintiff's Exhibit I, page 64 to and including 68; also called pages 230, to and including 234.)

None of this documentary proof is controverted or denied by the government and is amply supported by the government's own evidence.

The reference to certain former employees "who expressed the opinion that the Registrant was insincere" can only mean a reference to the F. B. I. report which is contained in the file. (Plaintiff's Exhibit I, page 64, underlined; also page 230.) The following are the only statements appearing in the resumé which could, in any way, reflect upon the Appellant.

> "The Registrant was employed by the Pringle Tractor Company at Watsonville, California, from April 19, 1950 to April 15, 1952. Several persons, who were associated with the Registrant, during this employment, including fellow employees and supervisors advised that they doubt the sincerity of the Registrant's claim as a conscientious objector."

Pure conclusion, without basis in fact.

> "One fellow employee stated that when he learned that the Registrant was claiming to be a conscientious objector, he was very much surprised. He stated that the Registrant had never indicated his objections and was a member of the Naval Reserve. The interviewee also advised that the Registrant's older brother had been in the Armed Forces. He noted that the Registrant

joined the Jehovah's Witnesses some time after he had joined the Reserve and prior to the time he was due to be drafted. He stated he did not feel that the Registrant was sincere in his objections as they seemed to be too new and preceded too closely his imminent induction into the Armed Forces. Several other persons gave much the same information."

Pure suspicion, speculation, opinion and unfounded conclusion.

"An Official of the Cooperative advised that he was somewhat surprised to learn from another employee that the Registrant was a conscientious objector as nothing about him would indicate that such was the case. He stated that he did not feel that the Registrant was sincere because he appeared to have acquired his objections shortly before he would be drafted."

Pure suspicion, speculation, opinion and unfounded conclusion.

"A fellow employee stated that one day he asked the Registrant about his draft status and the Registrant replied, 'I am not worried about the draft, because I am a conscientious objector.' The interviewee stated that this remark sounded to him like the Registrant was using this status as an 'out' to escape the draft and he did not feel that the Registrant was conscientiously opposed to Military Service, but that he just did not want to go into the service and would use this as a means to evade it."

Again pure suspicion, speculation, opinion and unfounded conclusion.

A person connected with the Townsend Electric Company stated as follows:

> "He further stated that he did not believe the Registrant was sincere in his objections to Military Service inasmuch as it appeared to him that the Registrant was an individual very much concerned with making money."

Nothing but opinion and unfounded conclusion.

A neighbor was interviewed and stated as follows:

> "The neighbor stated that he could not feel that the Registrant is sincere in his objections to Military Service but feels that the Registrant is deliberately trying to 'evade service.' It was the neighbor's opinion that the Registrant's mother is very much the dominating member of the family where religion is concerned and that she is counselling the boys. The neighbor stated that it has been his observation that the Registrant drives a 1951 Pontiac and appears to be gainfully employed. He states that it was difficult for him to understand how the Registrant can spend as much time as he does making money so that he can obtain material things when it is his claim that he is opposed to military training and service because of his religious convictions."

More suspicion, speculation, opinion and unfounded conclusion.

Although the record is voluminous as can be seen from the Exhibits, not one other shred of evidence appears in the file which, in any way, could, by any stretch of the imagination, be considered a fact upon which the Appeal Board could justify a rejection of

the Appellant's Claim as a conscientious objector. This being so, it then becomes necessary to analyze the foregoing statements to determine whether they could rise to the dignity of competent evidence or any evidence. A cursory reading of these statements compels the conclusion that they are merely the suspicions, speculations, beliefs and conclusions of these persons without giving a single fact upon which beliefs are predicated, and do not rise to the dignity of evidence.

(c) Discussion of Law Applicable.

The question concerning this type of evidence has been considered in a number of cases involving like questions, one of which was *Annett v. United States of America,* Tenth Circuit, 1953, 205 Fed. 2d 689, in which the Court held:

> "The Government's case, aside from the exhibits of the official actions of the various boards, rests upon the two reports and recommendations of Hearing Officer, Belisle. In his report of December 4, 1950, he set out a number of statements made to him by persons he interviewed. The witnesses adverse to Annett merely stated that they did not believe him to be sincere and did not consider him entitled to a conscientious objector status. They all referred to the fact that in their opinion he had a poor family background. *But all they stated was their opinion or conclusion. They gave no basic facts, no evidence whatever on which such belief was predicated.* Thus the chief of police and long-time former sheriff of Woods County, Oklahoma, stated that Annett came from a poor family back-

ground and he did not consider him entitled to a conscientious objector's rating. Assuming that this appraisal of his background was correct, it is in nowise material or indicative of Annett's status as a conscientious objector. *To merely state that he does not consider him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence. It states the mere belief and conclusion of the witness.* Whether he is entitled to the status he sought was for the determination of the board to be made from positive evidence adduced before it. All the remaining adverse witnesses set out in Belisle's report merely stated that they did not believe he was entitled to what he sought without the statement of a single fact on which they based their belief. To illustrate: an undersheriff stated that he was not sufficiently acquainted with Annett to comment on his sincerity of this conscientious objector claim; yet, he stated that he did not believe that he was entitled to it."

"Your hearing officer was not impressed with the manner in which the registrant answered questions propounded to him. There is an abundant amount of evidence furnished in his behalf, principally by members of his own faith. However, a large portion of it is devoted to his ministerial activities, which your hearing officer is not endeavoring to pass upon other than in connection with the claim of registrant as a conscientious objector. Your hearing officer is unable to reconcile the belief of the registrant that he may, under the Scriptures, defend himself even to the extent of killing, but not able, under his faith, to serve his country in military service; especial-

ly, where he was unable to state his authority for the defense of himself in the same Bible which he used to sustain his objections. Your hearing officer is not satisfied with the sincerity of the registrant for the further reason that the evidence furnished by the registrant was inadequate and did not have that quality necessary to sustain his position."

"It is thus clear that Belisle applied an erroneous standard in determining that Annett was not entitled to a conscientious objector status. The standard laid down in the statute is religious training and belief opposed to participation in war in any form and as stated in the statute, ' "Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relations * * * "' Annett's positive uncontradicted testimony established that his religious beliefs met this test. The mere fact that he was willing to fight in defense of his own life does not mean that he did not have good-faith religious scruples based upon the teachings of his church against the command of his country to go to war and to kill therein."

"In his second report filed February 14, 1952, Belisle likewise concluded that Annett was not entitled to the status claimed by him. These conclusions were based in general on the same line of information reported in his first report. In fact, it was based in large part upon the same statements of the same witnesses as in the first report. Illustrative of the character of the evidence are the following excerpts:

"In his second report recommending a rejection of the claimed status, Belisle stated that the

background of Annett was not good in that his parents were of questionable character and reputation and had formerly belonged to the Catholic Church but joined Jehovah's Witnesses in the latter part of the 1930's; that this was quite a departure and that the two religions could in no way be reconciled. What materiality this had upon whether Annett became a member in good faith of the Jehovah Witness Church and had a religious conscientious objection to going to war is difficult of comprehension. Belisle did report that Annett was raised almost wholly in the faith of Jehovah's Witnesses and was endeavoring to rise above the reputation of his family and in some respects had some fine qualities. He also reported that Annett furnished abundant testimony and evidence of his sincerity. Belisle was impressed by the fact, and no doubt influenced in his conclusions, by his impression that Annett did not have ' "that humility ordinarily incident to one having the deep, sincere, religious objection to service in our military forces." ' Based upon this he stated, ' "It is, therefore, the considered opinion of your hearing officer that the evidence is insufficient to sustain the position taken by the registrant." '

"The record is devoid of a single act, word or any conduct by Annett or of the testimony of any witness to a single fact which would tend to show that Annett was not a member in good faith of the Jehovah Witness religious organization with religious convictions against participation in war. A careful analysis of the record compels the majority to conclude that there is a complete lack of any substantial evidence to support the conclusions of the board and its order was there-

fore void. The order of the board being void, Annett was guilty of no offense in refusing to submit to induction."

"Since the record is devoid of any evidence sustaining the finding of the board that Annett was not a member in good faith of Jehovah's Witnesses, possessed of an honest religious conviction against participation in war, the judgment cannot stand and it is, therefore, not necessary to separately inquire whether there is evidence sufficient to support the finding that he was not a minister of the Jehovah Witness faith." (Italics ours.)

There have been a great many decisions by many courts of appeal including the Ninth Circuit that the rule laid down in *Dickinson v. United States,* 346 U.S. 389, is applicable in the consideration of a classification as conscientious objector. The Supreme Court in that case held as follows:

"The Court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence . . . However, Dickinson's claims were not disputed by any evidence presented to the Selective Service Authority, nor was any cited by the Court of Appeals. The task of the Courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed, the board bears the ultimate responsibility for resolving the conflict

—the Courts will not interfere. Nor will the Courts apply the test of 'substantial evidence.' However, the Courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption. . . . But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the act and foreign to our concepts of justice."

Other cases applying this "basis in fact" test, are:

Weaver v. U. S., 8th Cir., 1954, 210 F. 2d 815, 822, 823;

Taffs v. U. S., 8th Cir., 1953, 208 F. 2d 329, 331, 332;

U. S. v. Hartman, 2nd Cir., 1954, 209 F. 2d 366, 368, 369, 371;

U. S. v. Sicurella, 348 U. S. 385;

Olvera v. U. S., 223 F. 2d 880, 5th Cir;

Pine v. U. S., 4th Cir., 1954, 212 F. 2d 93, 96, 97;

Arndt v. U. S., 222 F. 2d 485, 5th Cir.;

Jewell v. U. S., 6th Cir., 1953, 208 F. 2d 770, 771-772;

U. S. v. Ransom, 223 F. 2d 15;

Jessen v. U. S., 10th Cir., 1954, 212 F. 2d 897, 899-900;

U. S. v. Close, 7th Cir., 1954, 215 F. 2d 439, 441;

U. S. v. Wilson, 7th Cir., 1954, 215 F. 2d 443, 445, 446.

In *Jessen v. U. S.,* 10th Cir., 1954, 212 F. 2d 897, 900, after quoting from *Dickinson v. U. S.,* 346 U. S. 389, 1953, the Court said:

> "Here the uncontroverted evidence supported the Registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the trial court in this action is in direct conflict with the holdings in other cases decided by other Courts of Appeals. In those cases, the Appellant, like petitioner here, were Jehovah's Witnesses. They showed the same religious belief, the same objections to service, and the same religious training. While different speculations were relied upon by the government which were discussed and rejected by the Courts in those cases, the Courts were also called upon to say on identical facts whether there was basis in fact. For instance, in the *Jessen* case (supra) where the 10th Circuit (after following *Taffs v. U. S.*, 8th Circuit, 1953, 208 F. 2d 329) said:

> "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board. All of the witnesses interviewed by the Federal Bureau of Investigation, who doubted the sincerity of Appellant, placed their doubt upon the pure speculation that because he became a conscientious objector and a member of the Jehovah's Witnesses at or about the time he was to be drafted that he was, therefore, insincere. This question has been considered and rejected by the 9th Circuit, in a case directly in point—*Schuman v. U. S.*, 9th Circuit, 1953, 208

> Fed. 2nd, 801, where the court held: 'The length of time one has been connected with a faith has no bearing on whether one is entitled to exemption as a conscientious objector.' The only question to be considered is whether the Registrant has a sincere ('i.e. conscientious') religious opposition to participation in war in any form."

The hearing officer's reports and the Department of Justice reports should be scrutinized for facts, not speculations. If it appears that there is nothing affirmatively denying the statements of the registrant and the recommendation is based on unsupported opinions, suspicions and conclusions of others that appellant's beliefs were not deep-seated, this standing alone is not a contradiction of the proof of sincerity. These suspicions are based largely, if not exclusively, on the proposition that Appellant has not been long and deeply trained in religion.

One fallacious defense of the report of the hearing officer was made by the Government in the court below. It was that he exercised his right of judging the credibility of the petitioner. The hearing officer did not undertake to say that he disbelieved what Appellant said. At the hearing he made no challenge of the credibility of the petitioner. It cannot be speculated that he disbelieved Selby. *(Annett v. United States,* 10th Cir., 1953, 205 F. 2d 689, 691.) A draft board or a hearing officer has the right to challenge the believability of a registrant but if he does so he must make a record of the exercise of the right and state expressly that he does not believe the claimant. Fail-

ure thus to make an entry that he disbelieved the registrant precludes the Government from arguing it here. *National Labor Relations Board v. Dinon Coil Co.,* 201 F. 2d 484, is therefore not in point.—See also *Weaver v. United States,* 8th Cir., 1954, 210 F. 2d 815.

In the instant action, however, we have a direct statement made by the Hearing Officer that he did believe the Defendant by finding as follows: "It is true that the registrant has lived a clean and moral life". (Pl. Exh. 2, also Reporter's Transcript, page 78.)

A case directly in point is *Schuman v. United States,* 9th Cir., 1953, 208 F. 2d 801. (Compare *White v. United States,* 9th Cir., Sept. 14, 1954, 215 F. 2d 782.) Schuman filed the conscientious objector form late. He became one of Jehovah's Witnesses after he filed his classification questionnaire. The facts are stated in the opinion in that case.—See 208 F. 2d, pp. 805-806.

The report and recommendation of the hearing officer and the final recommendation by the Assistant Attorney General were not findings of fact. They refer to no facts or evidence that disputed the testimony given by Defendant. The conclusions of fact and law made by the hearing officer and the Assistant Attorney General were erroneous and contrary to fact and law. They do not constitute any facts. They may not be relied upon as basis in fact. This is especially true since no facts were referred to by the hearing officer or the Assistant Attorney General that in any way contradicted the testimony of Defendant.

The rule of *Dickinson v. United States,* 346 U.S. 389, 396-397 (1953), applies here. This rule also rejects the conclusion of the hearing officer of the Department of Justice and the report of the Assistant Attorney General in the same way that it also rejects the final I-A classification by the appeal board. Neither of these officers is authorized to speculate and guess or draw inferences contrary to the undisputed evidence.—*Dickinson v. United States,* 346 U. S. 389 (1953); see also *Schuman v. United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 805-806.

Since the hearing officer and the Assistant Attorney General cannot speculate, then their speculations are unauthorized and cannot be relied upon by this Court as basis in fact for the denial of the conscientious objector status. It should be remembered that registrants are authorized to change their status after the filing of their classification questionnaires. There was a change of the status of the registrant in *Dickinson v. United States,* 346 U. S. 389, 392-393, 395 (1953.) This was held not to be any basis in fact for the denial of the classification. Section 1625.1(a) of the Selective Service Regulations provides that "no classification is permanent." Section 1625.2 provides for the reopening of the classification when there has been a change in the status of the registrant, following his classification. These regulations were interpreted by the court in *Hull v. Stalter,* 7th Cir., 1945, 151 F. 2d 633, 635, to mean that a registrant must have his status determined according to the time of the final classification rather than his status at the time of his regis-

tration or at the time of his first classification.—See also *Brown v. United States,* 9th Cir., Oct. 4, 1954, 216 F. 2d 258.

The scope of review in Selective Service cases as far as the classification is concerned is limited and restricted. *(Estep v. United States,* 327 U. S. 114, 121-122 (1946).) In cases where the review is restricted there must be a strict compliance with the requirements of procedural due process by the administrative agency. *(N. L. R. B. v. Cherry Cotton Mills,* 5th Cir., 1938, 98 F. 2d 444, 446.) For the final order to be valid the local board must strictly comply with the procedural requirements.—*Ver Mehren v. Sirmyer,* 8th Cir., 1929, 36 F. 2d 876, 881; *United States v. Zieber,* 3rd Cir., 1947, 161 F. 2d 90, 92; *Ex parte Fabiani,* E. D. Pa., 1952, 105 F. Supp. 139, 147-148; *United States v. Graham,* N. D. N. Y., 1952, 108 F. Supp. 794, 797; *Bejelis v. United States,* 6th Cir., 1953, 206 F. 2d 354, 358.

The report of the hearing officer was adopted by the Department of Justice and forwarded to the appeal board with a recommendation that it be followed. The appeal board followed the recommendation. While the recommendation was only advisory, the fact is that it was accepted and acted upon then by the appeal board. The appeal board concurred in the conclusions reached by the hearing officer. It gave petitioner a I-A classification and denied his conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error.—*United*

States v. Everngam, D. W. Va., 1951, 102 F. Supp. 128, 131; *Goetz v. United States,* 9th Cir., Oct. 14, 1954, 216 F. 2d 270; *Hinkle v. United States,* 9th Cir., Sept. 24, 1954, 216 F. 2d 8; *Clementino v. United States,* 9th Cir., Sept. 27, 1954, 216 F. 2d 10.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board become a link in the chain. Since it is one of the links of the chain, its strength must be tested. *(United States v. Romano,* S. D. N. Y., 1952, 103 F. Supp. 597, 600-601.) The illegal recommendation by the hearing officer and the Department of Justice to the appeal board produces a break in the link and makes the entire Selective Service chain useless, void and of no force and effect. In *Kessler v. Strecker,* 307 U. S. 22, 34 (1939), the Court held that if one of the elements is lacking the "proceeding is void and must be set aside." Acceptance of the recommendation of the Department of Justice that has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.—*Hinkle v. United States,* supra; *Clementino v. United States,* supra.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *Hinkle v.*

United States, supra; *United States v. Everngam,* D. W. Va., 1951, 102 F. Supp. 128, 130, 131; see also *Goetz v. United States,* 9th Cir., supra; *United States v. Bouziden,* W. D. Okla., 1952, 108 F. Supp. 395, 397-398; compare *Taffs v. United States,* 8th Cir., 1953, 208 F. 2d 329, 330-331.

The report of the hearing officer and the recommendation of the hearing officer to find against petitioner on grounds outside the law are condemned by *Reel v. Badt,* 2 Cir., 1944, 141 F. 2d 845, 847. In that case the court said: "In other words he reached a conclusion as a matter of law which was directly opposed to our decision in *U. S. v. Kauten,* 2 Cir., 133 F. 2d 703."—See also *Phillips v. Downer,* 2d Cir., 1943, 135 F. 2d 521, 525-526.

It is respectfully submitted, therefore, that the recommendation by the hearing officer and the Department of Justice to the appeal board is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report was based.

It may be argued that the classification by the draft boards is final even though erroneous. This is not a true statement of the law. It is true so long as the Government can show some contradiction or dispute in the administrative record. In the absence of such dispute of fact, it cannot be said that there is a question of fact involved. Since there is no question of fact involved, and the classification is contrary to the facts establishing eligiblity for the classification claimed, there is no basis in fact and the draft boards are without jurisdiction, as a matter of law.—*Estep*

v. United States, 327 U. S. 114, 122-123 (1946); *Dickinson v. United States,* 346 U. S. 389, 394, 396-397; *Schuman v. United States,* 9th Cir., 1953, 208 F. 2d 801, 802, 804-805; *Jewell v. United States,* 6th Cir., 1953, 208 F. 2d 770, 771-772; *United States v. Hartman,* 2d Cir., 1954, 209 F. 2d 366, 368, 369-370.

An attempted distinction of the "no basis in fact" rule is made between the case of a conscientious objector and a minister. *(United States v. Simmons,* 7th Cir., 1954, 213 F. 2d 901, 904-905; *White v. United States,* 9th Cir., 1954, 215 F. 2d 782.) It is said that determination of the conscientious objector status involves inquiring into mental processes of a registrant. Those courts say that when the local board has said what is going on in the registrant's mind, such conclusion is final and settles the matter. It cannot be reviewed in court, declare such courts.

There is not one word in the act or the regulations that gives the board or the courts the right so to speculate. They cannot say what goes on in the mind of a conscientious objector claiming such classification, as they cannot in the case of a minister claiming his exemption.

The act deals only with the objective statements and declarations of the registrants. It does not mention or go into the subjective. Congress conferred no right to roam into the field of mind reading, as suggested by the Government. Congress confined the courts and the boards to determination of the conscientious objector status based only on the concrete and outward manifestations of the registrant.

The act deals with objection or opposition to service in the armed forces. Objection is something objective. It is manifested by speech. It is something that can be determined as easily as any other fact. Does the registrant object to the point of refusing to do military service? If he does he is an objector. The inquiry is then specified by the act, dealing again with the concrete not mind reading. The act says: Is his objection based upon religious training and belief? This is an element that does not involve the subjective. It deals with that which is manifest. It can be established the same as can the ministry claim. There is no broader room for speculation permitted by the act here because it deals with religious training and belief. The two concrete facts of opposition to service and religious training and belief make a *prima facie* case for classification as a conscientious objector under the statute.

By using the word "conscientiously" from the statute, the Government argues that it can apply its own arbitrary ideas as to what constitutes a conscientious objector. Use of the word does not allow the Government to write its own definition of what a conscientious objector is. The definition appears in the statute.

The use of the word "conscientiously" in the act that qualifies objection to training and service does not give the Government an illegal, vague and indefinite dragnet. The word is not a license to indulge in speculation. The word has no magic to it. It has an ordinary definition known to man. It is not a word that is confined to the esoteric or to clairvoyants. It cannot be used to take the board and the courts out of this

world into the stratosphere of speculation. But the Government would have the Court soar up into it, contrary to law.

By the use of the word "conscientiously" Congress merely intended that if a man was a faker, feigning or falsely impersonating a conscientious objector the board could conclude that he was not "conscientiously" opposed. But surely by the use of the word "conscientiously" Congress did not intend to allow a board to speculate and defy the undisputed evidence showing that a person is an objector to training and service, based on religious training and belief. The use of the word "conscientiously" merely permits the draft board to do what the Supreme Court said in *Dickinson v. United States:*

> "The board must find and record affirmative evidence that he has misrepresented his case."—346 U.S. 389, 399.

Had Congress intended to give such claimed unlimited power to the boards in cases of conscientious objectors it would have said so. Surely it did not intend to allow the courts to interpret the word "conscientiously," used in the statute, to give a power to the boards over conscientious objectors that was not given to the boards in the case of other registrants.

If the Government is right on the interpretation it puts on the act then it will be impossible for a court ever to say that there is "no basis in fact" for the denial of the conscientious objector status. If the boards can, under a vague interpretation of "conscientiously," reject the evidence of one conscientious objec-

tor without any concrete, definite, disputing evidence in one case, then they can do it in all cases of conscientious objectors, regardless of the facts. Then all is ended. No longer will the "no basis in fact" rule mean anything to the conscientious objector. Through this sleight-of-hand process of argument the Government is attempting to amend the act. The Court should continue to stand by the proposition that conscientious objectors are to be given the same fair treatment under the act as all other classes of registrants are entitled to receive.

Respondent subjugates the power of this Court to that of the appeal board. It may be said that the Court is with nothing but the cold record before it. Add the contention that the Court is not in a good position to rule on a question that involves the examination of the state of mind of a defendant. However, the appeal board that made the final classification in this case, petitioner submits, is in no better position than this Court. All that the appeal board had was the cold record before it. That is no more than this Court has. What superior powers do the men on the appeal board have over the judges on this Court in interpreting the law and applying it to the cold record? None. The power is with this Court to correct the gentlemen on the appeal board.

The suggestion was made in the court below that an inference can be drawn, particularly after looking at the registrant himself, that this registrant is not sincere and religious. This should be rejected. (*White v. United States,* 9th Cir., Sept. 14, 1954, 215 F. 2d 782.)

The appeal board here did not see the registrant. It had no chance to exercise the right claimed by the Government. It did not give any reasons why it rejected the claim. It is pure speculation for the respondent to suggest that this was the reason for the denial of the conscientious objector status. (*Dickinson v. United States,* supra; *Schuman v. U. S.,* supra.) It must affirmatively appear from proof in the file. The respondent shows that it is relying entirely on speculation. This is not permitted in cases of this kind.

There is no basis in fact for the classification in this case, because there are no facts that contradict the documentary proof submitted by petitioner. The facts established in his case show that he is a conscientious objector to combatant and noncombatant military service by reason of religious training and belief. The classification given is beyond the jurisdiction of the boards.

It is respectfully submitted that the denial of the conscientious objector claim by the appeal board is without basis in fact, arbitrary and capricious, and therefore a nullity.

It follows therefore that Selby violated no law by refusing to be inducted and the judgment of the trial court should be reversed.

Dated, San Francisco, California,
May 10, 1957.

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